IN THE

# Supreme Court of the United States

OCTOBER TERM, 1962

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Nos. 108-110, 125

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INTERSTATE COMMERCE COMMISSION,
*Appellant in No. 108*
SEA-LAND SERVICE, INC., *Appellant in No. 109*
SEATRAIN LINES, INC., *Appellant in No. 110*
UNITED STATES OF AMERICA, *Appellant in No. 125*

v.

THE NEW YORK, NEW HAVEN AND HARTFORD
RAILROAD COMPANY, et al., *Appellees.*

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**On Appeal from the United States District Court
for the District of Connecticut**

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## BRIEF OF THE WATERWAYS FREIGHT BUREAU AS AMICUS CURIAE

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### STATEMENT OF INTEREST

The Waterways Freight Bureau is an organization of common carriers by water holding certificates from the Interstate Commerce Commission and operating on the Mississippi and Ohio rivers and connecting and tributary waterways. The Bureau engages in joint

consideration of traffic matters, including rates and charges of its members, pursuant to an agreement approved by the Commission under Section 5a of the Interstate Commerce Act. *Waterways Freight Bureau—Agreement*, 277 I.C.C. 593 (1950), as amended. The Bureau also participates on behalf of its members in proceedings before the Interstate Commerce Commission and before the Courts involving the lawfulness of rates under the standards of the Interstate Commerce Act. Written consent for the filing of this brief *amicus curiae* has been obtained from counsel for all parties of record.

The interests of the members of, and the inland water carrier industry represented by, the Waterways Freight Bureau in the instant case are vital and far-reaching. Like the coastwise water carrier industry, whose very existence turns on the Court's decision in this case, the future of the inland water carrier industry is inextricably involved in the regulation of rail-water competition. The decision of the court below has been followed by at least one other court in overturning a Commission decision involving rail-inland water carrier competition. See *Pennsylvania Railroad Co., et al.* v. *United States, et al.*, 202 F. Supp. 584 (E.D. Pa. 1962). It is vitally important to the growth and economic stability of the inland water carriers that the issues of law before the Court be resolved definitively and conclusively.

## SUMMARY

Section 15a(3), added to the Interstate Commerce Act in 1958, prohibits the Interstate Commerce Commission from holding up the rates of one mode of transportation to protect the traffic of another mode,

"giving due consideration to the objectives of the national transportation policy declared in . . . [the] Act." National Transportation Policy and Section 15(a), Interstate Commerce Act, 49 U.S.C. preceding sections 1, 301, 901 and 1001, and section 15a(3). The Congressional intent was to encourage fair and constructive competition by permitting each mode greater freedom in asserting its inherent advantages of cost or service. Congressional intent is equally clear that the section was not intended to curb or impair the Commission's power to prevent destructive competition. S. Rep. No. 1647, 85th Cong., 2d Sess., 3-4 (1958).

Section 15a(3) must be interpreted to further the objectives of the National Transportation Policy. The prohibition in that section applies only where it furthers the assertion of inherent advantages and not where such prohibition would operate solely in derogation of other objectives of the Policy. *A fortiori*, the Commission may prevent destructive competition, where rate-making is not shown to involve the assertion of inherent advantages of cost or service.

Destruction of one carrier industry by another constitutes destructive competition, which the Commission must prevent, in the absence of proven inherent advantages justifying such destruction. *Moore* v. *Mead's Fine Bread Co.*, 348 U.S. 115 (1954).

Fully-distributed cost, determined in the manner prescribed by the Commission, is the criterion for determining inherent advantages of cost.

One mode of transport which is the higher cost mode on a particular type of service may not, by cutting

rates on that type of service, deprive another mode of its inherent advantage of cost vis-a-vis that service.

Where one mode of transport has an inherent advantage in cost or service, the Commission has power to protect the traffic of that carrier at rate levels above its fully-distributed cost.

## ARGUMENT

### I. THE NEW RULE OF RATEMAKING AND THE NATIONAL TRANSPORTATION POLICY

The instant case involves an extremely important problem in statutory interpretation. Basically, it involves the reconciliation of the text and purpose of an amended rule of inter-modal competitive ratemaking with a coordinated system of regulation for all modes of transportation. The problem is one of *harmonizing* purposes which are apparently in conflict. The solution does not lie in wholesale displacement and repeal of existing standards by the new amendment. Careful analysis of the new amendment shows that such a result was not intended by Congress. Instead, it is quite clear that the new rule of ratemaking is consistent with, and by no means in derogation of, existing policy standards.

The case at bar poses the direct issue of the relationship between the provisions of the National Transportation Policy [1] and the new rule of ratemaking in Section 15a(3) of the Interstate Commerce Act.[2] The

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[1] National Transportation Policy, Transportation Act of 1940, 54 Stat. 899, c. 722, 49 U.S.C., preceding sections 1, 301, 901 and 1001.

[2] Transportation Act of 1958, 72 Stat. 572, 49 U.S.C. sec. 15a(3).

instant proceeding involves regulation of the rates of competing modes of transportation. The railroads reduced their rates on TOFC (trailer-on-flat-car) service to parity with the rates of competing coastwise water carriers. (R. 35) The Interstate Commerce Commission found that the coastwise carriers could not attract traffic under such a rate relationship (R. 34). Considering relative costs and value of service to the shipper of rail and water service, the Commission was unable to conclude whether either type of carrier possessed an inherent advantage of cost or service. (R. 36-37). That agency did conclude, however, that the rail rate reductions would precipitate further cycles of rate cutting which would not stop even after reaching a destructive level. (R. 29). Finally, and most important, the Commission concluded that the rail rate reductions were an initial step in a program of rate reductions which threatened the continued existence of the coastwise water-carrier industry generally. (R. 38). The Commission found that under these circumstances, the Interstate Commerce Act required holding up rail TOFC rates to a level above water carrier rates. The district court reversed the Commission, holding that the Commission could not prevent the railroads from reducing their rates unless this was necessary to protect an inherent advantage of the water carriers. The basic issue now before the Court is whether, under the circumstances described, the Commission's requirement of a rail rate level above that of the water carriers violates the new rule of ratemaking in Section 15a(3), interpreted in the light of the National Transportation Policy.

The problem now before the Court had its genesis in the extension of the Interstate Commerce Commis-

sion's regulatory power to encompass competing *modes* of transportation. Regulation of diverse types of carriers—railroads, motor carriers and water carriers—presented entirely new regulatory problems. New standards of regulation were called for. The National Transportation Policy was Congress's response to that need.

It is significant that the first formulation of that policy was contemporaneous with the extension of the Commission's jurisdiction to include, for the first time, two competing modes of transport—railroads and motor carriers.[3] When the Transportation Act of 1940 extended regulation to water carriers, the National Transportation Policy was enacted to guide the Commission in regulating carriers of varying characteristics and advantages—railroads, water carriers and motor carriers.[4]

The legislative history of the policy clearly reveals that one of the primary purposes of that policy was to require the Commission to preserve the "inherent advantages" of water transportation. See separate opinion of Mr. Justice Black, dissenting, in *Interstate Commerce Commission* v. *Inland Waterways Corp.*, 319 U.S. 671 (1943), at pages 697-703, which contains an extended discussion of this legislative history. There were repeated assurances by the sponsors of this legislation that these inherent advantages would be preserved.[5] The Waterways Freight Bureau strongly en-

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[3] Motor Carrier Act of 1935, 49 Stat. 543, c. 489, as amended 54 Stat. 919 (1940).

[4] 49 U.S.C. preceding sections 1, 301, 901 and 1001.

[5] See also S. Chesterfield Oppenheim, "The National Transportation Policy and Inter-Carrier Competitive Rates" (1945), at pages 4-15.

dorses freedom to assert inherent advantages of cost or service in "fair and constructive" competition. But the fact that competition in transportation has destructive tendencies places the instant proceeding, where such tendencies have become manifest, outside the realm of healthy competition.

In the National Transportation Policy, Congress enumerated several criteria to shape the Commission's regulation of competing modes. There is to be "fair and impartial regulation of all modes of transportation . . . so administered as to recognize and preserve the inherent advantages of each."[6] The Commission is "to promote safe, adequate, economical and efficient service and foster sound economic conditions in transportation and among the several carriers." Insofar as ratemaking is concerned, the Commission is to encourage reasonable charges without "unfair or destructive competitive practices." All these criteria are directed "to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense."[7]

What Congress sought to achieve in enacting this policy is of crucial importance to the instant proceeding. The change in the character of Commission regulation was clearly stated in *Eastern-Central Motor Carriers Asso.* v. *United States,* 321 U.S. 194 (1944), at pages 205-207:

> "But with the evolution of other forms of carriage, particularly motor carriage, and the Com-

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[6] National Transportation Policy, *supra.*

[7] National Transportation Policy, *supra.*

mission's acquisition of control over their rates and operations, a new situation arose. The Commission's task no longer was merely the regulation of a single form of transport, to secure reasonable and nondiscriminatory rates and service. It became, not merely the regulator, but to some extent the coordinator of different modes of transportation. With the addition of motor and water carriage to its previous jurisdiction over rails, it was charged not only with seeing that the rates and services of each are reasonable and not unduly discriminatory, but that they are coordinated in accordance with the national transportation policy, as declared by the later legislation. This, while intended to secure the lowest rates consistent with adequate and efficient service and to preserve within the limits of the policy the inherent advantages of each mode of transportation, at the same time was designed to eliminate destructive competition not only within each form but also between or among the different forms of carriage.

"Necessarily the impact of these changes brought problems the Commission previously had not faced. Necessarily too the Commission in facing them, including those of adjustment among the various forms of transportation, called upon its previous experience in the railroad field for guidance to its judgment. But that experience could not apply fully to the other and different forms of carriage. Nor could it do so always when the interests of two or more were found in conflict. Each form of transportation presents, by reason of its peculiar operating conditions, its own problems for the function of rate making. And each, by virtue of competition with others, presents additional complications arising from the varied circumstances of their operation. Hence, in such situations, principles previously established for application within a single form of transportation cannot always be transplanted to

control its relations with another or those of both with the public generally, without consequences unduly harmful to one or to the public interest."

Under the National Transportation Policy, the Commission was, therefore, given a new and *affirmative* duty—to regulate so as to achieve a *coordinated* system of various modes of transportation. Insofar as the regulation of intermodal competition is concerned, the prohibition against "destructive competitive practices" and the fostering of "sound economic conditions in transportation and among the several carriers" definitely excluded a passive role for the Commission, in which they were to be heedless of the results competition might produce.

Any question as to the weight to be accorded the National Transportation Policy was eliminated by the Whittington Amendment, which added the following language to the policy (84 Cong. Rec. 9861):

> "All the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy." 49 U.S.C. preceding sections 1, 301, 901 and 1001.

Far from being a technical preamble, the policy was instead a direct guide for interpreting and applying the specific provisions of the Act.

It was in this statutory context that Section 15a(3) was added to the Interstate Commerce Act in 1958.[8]

[8] Transportation Act of 1958, 72 Stat. 572, 49 U.S.C. Sec. 15a(3). This section reads as follows:

> "(3) In a proceeding involving competition between carriers of different modes of transportation subject to this Act, the Commission, in determining whether a rate is lower than a reasonable minimum rate, shall consider the facts and circum-

The last sentence of that section clearly indicates that, like all other provisions in the Act, this section is subordinate to, and must be interpreted in the light of, the National Transportation Policy:

> "Rates of a carrier shall not be held up to a particular level to protect the traffic of any other mode of transportation, *giving due consideration to the objectives of the national transportation policy declared in this Act.*" (Emphasis supplied.)

The legislative history of Section 15a(3) clearly shows that it was not intended to alter the National Transportation Policy.[9] Clearly, Congress emphasized that the new section was to be utilized in effectuating policy objectives, and not in derogation of them.[10]

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stances attending the movement of the traffic by the carrier or carriers to which the rate is applicable. Rates of a carrier shall not be held up to a particular level to protect the traffic of any other mode of transportation, giving due consideration to the objectives of the national transportation policy declared in this Act."

[9] At 104 Cong. Rec. 12532, Cong. Fulton queried: "So that it would simply be that this legislation is a guide to the Commission, not an alteration of the basic transportation policy; is that true?" Cong. Harris (one of the legislation's sponsors): "That is true."

[10] Sen. Potter left little doubt that the very intent of the new section was to secure *consistency* with the National Transportation Policy:

> "I believe it was on my suggestion that the full committee included in the bill language to correspond with the objectives of a national transportation policy. Under that policy, every mode of transportation is included.
>
> "Representatives of each mode of transportation testified before the committee that they would be perfectly happy to have their rate sections considered according to the national transportation policy. So in determining a rate, whether it be the rate for trucks, barge lines, or railroads, we stated that it had to be consistent with the national transportation policy." 104 Cong. Rec. 10860.

It is equally clear that Section 15a(3) was not intended to relegate the Commission to the role of a passive observer of the destructive effects that unrestrained competition might produce. Bills were introduced incorporating the "three-shall-not rule," which declared "that in determining what is less than a reasonable rate, the Commission: (1) shall not consider the effect of the rate on the traffic of other carriers; (2) shall not consider the relation of the rate to the rate of any other carrier; and (3) shall not consider whether the rate is lower than necessary to meet the competition of other carriers." H.R. Rep. No. 1922, 85th Cong., 2d Sess. (1958), at page 13. The possibility of "destructive competition" led to rejection of this rule. H.R. Rep. No. 1922, *supra,* at pages 13-14. Clearly, Congress did not intend that the Commission be powerless to deal with unrestrained competition, regardless of its destructive effect upon competing modes.

On the other hand, there was a purpose in enacting the new rule of ratemaking. That purpose is entirely consistent with the National Transportation Policy. Indeed, the purpose of the amendment is phrased in terms of one of the policy's objectives. This purpose was clearly stated many times in the legislative history of Section 15a(3), e.g., in H.R. Rep. No. 1922, 85th Cong., 2d Sess. (1958), at page 14:

> "The committee believes that the Commission consistently should follow the principle of allowing each mode of transportation to assert its inherent advantages, whether they be of cost or service, giving due consideration to the objectives of the national transportation policy declared in the Interstate Commerce Act." See also S. Rep. No. 1647, 85th Cong., 2d Sess. (1958) at page 3.

From this background of legislative history, several principles are clear. Congress intended that there be increased competition in transportation where such competition results from the assertion of inherent advantages in cost or service. To this end, the Commission may not hold up the rates of a carrier to a particular level to protect the traffic of any other mode. But the rule is not unqualified. The legislative history of the section is clear that it is not to be considered a license for destructive competition. The section also must be interpreted so as to *advance* the objectives of the National Transportation Policy.

It is possible to reconcile the new rule of ratemaking with the prohibition against destructive competition and with policy objectives without, as the court below has done, using the principle of inherent advantages to devour other statutory criteria, and in particular, the prohibition against "destructive competitive practices."

The prohibition against destructive competition clearly implies a restraint upon competition under certain conditions. The legislative history of Section 15a(3) clearly reveals an intent to promote only "fair and constructive" competition.[11] On the other hand,

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[11] Senator Bricker, who was active in drafting the Transportation Act of 1958, incorporated the following in his remarks concerning the new rule of ratemaking: "The whole purpose [of section 5, S. 3778] is to say in fairly clear terms that each form of transportation shall have full opportunity to make such rates as reflect its own inherent advantages so that the public may in every case have the ability and the opportunity to exercise its choice of the form of transportation to be used, cost and service considered, in the light of the transportation task to be performed. This will encourage fair and constructive competition. I emphasize the words 'fair and constructive' because by the language in section 5 of

destructive competition clearly exists in the elimination of competition through the exertion of advantages not stemming from superior efficiency or economy of operation. The Commission obviously is not precluded from using its minimum rate power under such circumstances, since such competition does not further the purpose behind the new rule of ratemaking —the assertion of inherent advantages of cost or service. Indeed, the Commission would appear obligated to halt clear-cut destructive competition in any situation where the assertion of an inherent advantage is not affirmatively involved.

In like manner, even in cases involving the assertion of inherent advantages, the Commission has the power to curb competition where rate wars are precipitated, resulting in the needless dissipation of revenues by both competing modes. Under the National Transportation Policy, the Commission must promote sound economic conditions in transportation and among the several carriers. A rate war involves weakening of the low-cost carrier as well as the high-cost carrier through dissipation of revenues necessary for their financial stability. In such cases, successive rate reductions may drive rates far below their normal level and undermine the financial stability of the carriers and their ability to render adequate service. In such a case, competition prevents particular traffic from bearing its proper

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the bill we are now considering the Commission, even though it is not to hold the rate of any carrier up to any particular level for the purpose of protecting the traffic of some other mode of transportation, is nevertheless to give due consideration to the objectives of the declaration of national transportation policy which prefaces the Interstate Commerce Act. That declaration of policy, I need not tell you, discourages unfair and destructive competitive practices." 104 Cong. Rec. 10844.

share of the transportation burden. See, e.g., *Cigarettes and Tobacco, N.C. to Official Territory,* 281 I.C.C. 127, 142 (1951). Where such a rate war exists, the Commission must prevent competition from depressing rate levels to the point where the competitors destroy each other. It is in this sense that "destructive competition" has been described as "self-destruction by the competitors." Concurring opinion of Commissioner Alldredge in *Petroleum Between Washington, Oregon, Idaho, Montana,* 234 I.C.C. 609, 651 (1939) *aff'd sub nom. Scandrett* v. *United States,* 32 F. Supp 995 (D. Oreg. 1940), *aff'd per curiam* 312 U.S. 661 (1941).

The opinion of the district court recognizes this danger. The court refers to the fact that some traffic does not pay the carrier's full costs of service. (R. 253) Obviously, other traffic must return revenues above fully-distributed cost to offset this traffic's deficiency in revenues. At the end of its opinion, the district court holds that if Sea-Land is found to possess an inherent advantage in cost of service, then the Commission may, giving effect to value of service considerations, prescribe rates so as to return to Sea-Land more than its fully-distributed costs on particular traffic. (R. 259) The principle enunciated by the district court is both sound and realistic. Obviously, if the inherent advantages of the low-cost carrier are to be preserved, the Commission cannot allow rate wars to continue until that carrier's financial stability is jeopardized. At the same time, where neither carrier has a demonstrated inherent advantage in cost or service, the National Transportation Policy's prohibition on "destructive competitive practices" requires the Commission to halt rate wars which have the sole effect of undermin-

ing sound economic conditions among the several carriers.

Finally, the very purpose of Section 15a(3) implies a limitation on that Section's application. This purpose has been shown to be that of encouraging fair and constructive competition. This purpose is not served by permitting rate cutting to reach the point where substantial competition is eliminated. Certainly this point is reached when an entire carrier industry is destroyed. When this occurs, the competitive incentive of the surviving carrier industry to assert its inherent advantages in ratemaking is lost. Thus, if the rule of ratemaking in Section 15a(3) is applied so as to permit the wholesale elimination of competition, the very purpose of that Section is thwarted. To hope for the competitive assertion of inherent advantages by different modes of transportation would be futile where there is no intermodal competition, and hence no competitive pressure, to compel such an effort. Wholesale elimination of competition can, as well, prevent the Commission from developing and preserving "a national transportation system by water, highway, and rail . . . adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense."[12]

Every one of the foregoing limitations on competition is consistent with, indeed, furthers increased competition in the transportation industry. None is inconsistent with normal, healthy competition in terms of relative efficiency and economic fitness. None is inconsistent with the elimination of the unfit under the stresses of healthy competition. All these limitations

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[12] National Transportation Policy, *supra*.

are necessary to insure economically sound competitors in the long run. With the Commission exercising restraint against destructive competition, it is much more likely that the Congressional intent of encouraging competition will be served. Far from erecting an umbrella over the economically unfit, these restraints on balance favor the efficient and economically fit carrier.

The new rule of ratemaking in Section 15a(3) can thus be interpreted to serve, rather than come in conflict with, the National Transportation Policy. Thus limited, the new rule of ratemaking insures sound economic distribution of traffic within the transportation industry, consistent with sound economic conditions and continuing vigorous competition among the carriers.

## II. THE INTERSTATE COMMERCE COMMISSION HAS CLEAR POWER TO PREVENT DESTRUCTIVE COMPETITION

The Interstate Commerce Commission's power to regulate carrier competition, and in particular, rail-water competition, consists basically of its power to fix minimum rates. This minimum rate power was granted to deal with a problem intrinsic to competition in transportation—the problem of destructive competition. In the instant case, it must be decided whether the Commission may exercise its minimum rate power to prevent destructive competition from extinguishing a water carrier industry.

The Commission was first given minimum rate power in the Transportation Act of 1920. The purpose in granting that power was made clear by Congressman Esch of the House Committee on Interstate and For-

eign Commerce, which prepared the appropriate legislation:

> "There is an advantage in giving the commission authority to fix a minimum rate. The commission has never heretofore had that power since the original act was adopted in 1887. We give it the right of fixing the minimum rate in order that it may meet some of the problems arising out of the long-and-short haul clause as contained in the fourth section. We give it the right of fixing a minimum rate in order that it may protect a water carrier against the destructive competition of a rail carrier. You know the story—you can read it upon every mile of every inland waterway of the United States—how the water carrier started, and then the rail carrier paralleled the river bank and made a rate so low that the water carrier had to abandon its line and its route, and after such abandonment the rail carrier raised the rate and the public was no better off and was, in fact, worse off than before. If the Commission fixes the minimum rate, it can say to the rail carrier: 'Thus far you can go, but no farther.' The water carrier must be permitted to live. To do this we must provide for the minimum rate." 58 Cong. Rec. 8317, Nov. 11, 1919.

Since 1920, the Commission has repeatedly used its minimum rate power to prevent destructive competition. For example, the Commission has expressly recognized that the power to fix minimum rates was granted primarily to prevent destructive competition and to promote the financial stability of the transportation agencies. *Petroleum Between Washington, Oregon, Idaho, Montana*, 234 I.C.C. 609, 637 (1939), aff'd *sub nom. Scandrett v. United States*, 32 F. Supp. 995 (D. Oreg. 1940), *aff'd per curiam* 312 U.S. 661 (1941).

Aside from the power to prevent destructive competition implicit in the means to carry out that power, the Commission is specifically directed to administer and enforce all the provisions of the Interstate Commerce Act "to encourage the establishment and maintenance of reasonable charges for transportation services . . . without unfair or destructive competitive practices." National Transportation Policy, 54 Stat. 899 (1940), 49 U.S.C., preceding sections 301, 901 and 1001.

The Commission's power to prevent destructive competition is, therefore, one of the clearest, most unequivocal powers granted that agency, going to the very heart of its authority over competing modes of transport. *That power was not repealed or eliminated by the Transportation Act of 1958.* The Transportation Act of 1958 added paragraph (3) to Section 15a of the Interstate Commerce Act. That paragraph reads:

> "(3) In a proceeding involving competition between carriers of different modes of transportation subject to this Act, the Commission, in determining whether a rate is lower than a reasonable minimum rate, shall consider the facts and circumstances attending the movement of the traffic by the carrier or carriers to which the rate is applicable. Rates of a carrier shall not be held up to a particular level to protect the traffic of any other mode of transportation, giving due consideration to the objectives of the national transportation policy declared in this Act." 72 Stat. 572 (1958), 49 U.S.C. Sec. 15a(3).

The basic intent of the amendment was to encourage competition between the different modes of transport by allowing the asse tion of legitimate economic ad-

vantages. The House Committee Report makes this clear:

> "... the Commission consistently should follow the principle of allowing each mode of transportation to assert its inherent advantages, whether they be of cost or service, giving due consideration to the objectives of the national transportation policy declared in the Interstate Commerce Act." (H.R. Rep. No. 1922, *supra,* at page 14.)

It was made clear, however, that the fair and desirable competition resulting from the assertion of inherent advantages of cost or service was not to be confused with "destructive competition." The Senate Committee on Interstate and Foreign Commerce made this clear:

> "[The section] is designed to encourage competition in transportation by allowing each form of transportation subject to the Interstate Commerce Act full opportunity to make rates reflecting the inherent advantages each has to offer, *with such ratemaking being regulated by the Interstate Commerce Commission, however, to prevent 'unfair or destructive competitive practices' as contemplated by the declaration of national transportation policy.* Under the committee amendment the principal emphasis, but not the exclusive emphasis, in a competitive ratemaking proceeding involving different modes of transportation will be on the conditions surrounding the movement of the traffic by the mode to which the rate applies." S. Rep. No. 1647, 85th Cong., 2d Sess. 3-4 (1958), (emphasis supplied). See also H.R. Rep. No. 1922, *supra,* at pages 13-14.

The sponsors of the amendment emphasized repeatedly that the Commission was to continue to prevent de-

structive competition. As Congressman Harris asserted: "We do not permit any carrier to engage in destructive competitive practices." 104 Cong. Rec. 12532. See also 104 Cong. Rec. 10844 (Senator Bricker), 104 Cong. Rec. 10859 (Sen. Smathers). In addition, the Commission was expected, under the new amendment, to follow the decision in *New Automobiles in Interstate Commerce*, 259 I.C.C. 475 (1945). (Congressman Harris, 104 Cong. Rec. 12531.) In that decision, expressly recognizing that its minimum rate power was conferred "mainly to prevent destructive competition" and to permit adequate earnings, the Commission held:

> "What constitutes a minimum reasonable rate is a matter to be determined in the light of the facts of record in each individual case, avoiding arbitrary action and keeping within statutory and constitutional limitations, just as in the case of maximum reasonable rates. Whether a rate is below a reasonable minimum depends on whether it yields a proper return; whether the carrier would be better off from a net-revenue standpoint with it than without it; *whether it represents competition that is unduly destructive to a reasonable rate structure and the carriers;* and whether it otherwise conforms to the national transportation policy and the rules of ratemaking declared in the act of 1940." 259 I.C.C. 534 (emphasis supplied).

In seeking to promote intensified competition, Congress obviously did not intend to curb the Commission's power to prevent destructive competition. Clearly the assertion of inherent advantages in cost or service produces the healthy form of competition which Congress wished to encourage. Congress did not, however, open the door to "destructive competitive

practices." Such practices are not the product of legitimate economic advantage and have no place in a sound transportation industry.

The court below did not expressly deny the Commission's power to prevent destructive competition. The court did, however, define destructive competition so narrowly as to eliminate it as an independent standard in the National Transportation Policy. Far from the unequivocal Congressional intent regarding the prevention of such destructive practices, the court below in effect held that destructive competition can be prevented only where necessary to preserve the inherent advantages of a particular carrier. Far from considering destructive competition as the *raison d'etre* for the Commission's minimum rate power, the district court reduces this criterion to a special case in the preservation of inherent advantages.

### III. DESTRUCTION OF ONE CARRIER INDUSTRY BY ANOTHER CONSTITUTES "DESTRUCTIVE COMPETITION," WHICH THE COMMISSION MUST PREVENT, IN THE ABSENCE OF PROVEN INHERENT ADVANTAGES JUSTIFYING SUCH DESTRUCTION

The court below held that the prohibition on differentials in Section 15a(3) is to be qualified only when necessary because of the interplay of two factors—the "inherent advantage" factor and the "destructive competitive practice" factor. (R. 252) The court committed a fundamental, basic error. *There is no interplay at all between the two factors.* The assertion of inherent advantages of cost or service produces fair and constructive competition. Such competition is completely consistent with promoting "safe, adequate, economical, and efficient service," and the fostering of "sound economic conditions in transportation and and among the several carriers," as the Commission

is required to do under the National Transportation Policy. On the other hand, the court failed to comprehend that destructive competition is something quite different. Such competition is not the product of inherent advantages of cost or service— it involves the exertion of predatory power that has nothing to do with relative efficiency or economic fitness. The court has totally failed to recognize the destructive tendencies of transportation competition—tendencies which led to the granting of minimum rate power to the Commission and which were fully recognized by Congress in enacting Section 15a(3). The significance of these tendencies was clearly stated by Chairman Freas of the Commission in testifying before the Surface Transportation Subcommittee of the Senate Committee on Interstate and Foreign Commerce, March 28, 1958:

> "I believe that if transportation history teaches any one thing, it is that while competitive forces generally are effective in reducing prices and improving standards of service, these very same competitive forces in the transportation field, if unchecked, will result in eliminating competition and in disrupting reasonable and fair rate relations as between competing shippers, geographical areas, and territories." [13]

In dealing with these destructive tendencies, in the case at bar the Commission considered the *elimination of coastwise water carrier competition* as an extraordinary situation requiring more than the mechani-

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[13] Hearings Before the Subcommittee on Surface Transportation of the Committee on Interstate and Foreign Commerce, "Problems of the Railroads," U.S. Senate, 85th Cong., 2d Sess., Part III, at page 1842.

cal application of cost formulas. In finding such destruction contrary to the National Transportation Policy, the Commission considered many factors. But the court below held that the Commission is reduced to the role of a cost finder and must blind itself to the fact that an entire carrier industry will be destroyed. As the court stated:

> "Apparently the Commission thought that any rate-competition which threatens the continued existence of a competitor it had power to prevent as a 'destructive competitive practice,' irrespective of whether the challenged rates were compensatory to the proponent thereof or whether the mode of the contesting competitor was a lower-cost mode than that of the proponent. This, we hold, was an erroneous interpretation of the Act, as amended." (R. 249)

The district court, in effect, held that competition is destructive only where rates are harmful to the proponent, i.e., are noncompensatory, or where a competitor is deprived of its inherent advantage as the lower-cost mode. (R. 251-252). By relating destructive competition solely to costs, the court has arrived at a superficially logical solution. But, in this mechanical approach to the problem, the court treated the elimination of the coastwise carrier industry as an irrelevancy which must be ignored. And in the very competitive situation at bar, where, according to the district court, neither carrier was found to have a proven inherent advantage in cost or service, the court has doomed the coastwise carriers to destruction from predatory power not based upon efficiency or economy of operation. The court has so rigidly adhered to its definition of destructive competition in terms of costs that it has applied that definition where it has no possible application.

Faced with the practical task of preserving a balanced transportation system by all modes, the Commission adopted a much more realistic approach. It viewed the demise of the coastwise carriers as, at the very least, warranting review of the desirability of their continued existence. The district court has condemned the Commission for doing what the seriousness of the situation demanded, namely, for treating the destruction of the coastwise carriers as at least requiring clear justification. Under the National Transportation Policy, the Commission could do no less.

In the present case, the railroads were unable, on the grounds of inherent advantages or otherwise, to justify the destruction of the coastwise carrier industry. In the absence of a showing of justification on the part of the railroads as the low cost carriers or on other grounds warranting the elimination and destruction of coastwise water transportation, the Commission necessarily condemned the proposed rail rates. No other result could be reached. The railroads had the burden of proving the lawfulness of their rates—a burden which they failed to sustain. As the district court observed, under Section 15(7) of the Act, "the burden of proof shall be on the carrier [who seeks a rate-change] to show that the proposed changed rate . . . is just and reasonable." (R. 258) As proponents of the reduced rail rates, the railroads had the burden of showing their own costs. (R. 258) The railroads' failure to show these costs, specifically noted by the district court (R. 255), was obviously the primary reason the Commission was unable to determine which type of carrier possessed an inherent advantage of cost. Any possible indeterminancy in cost due to cer-

tain "variables," referred to by the Commission (R. 36) could not have been decisive in the total absence of costs as to certain of the rail rates. Under the circumstances, the only finding permissible under Section 15(7) was that the proposed rail rates "are not shown to be just and reasonable."

The district court avoids this conclusion by holding that in a proceeding involving competing modes of transportation, the protestants (i.e., the water carriers) have the burden of showing their own costs. The holding is irrelevant, for Sea-Land *did* show its costs. The only failure to adduce relevant costs noted by the Commission and the district court was on the part of the railroads. (R. 36, 255) The district court was in error in rejecting the government's argument that the railroads failed to sustain their burden of proof. (R. 257-258) Considering such failure, the Commission was completely justified in preventing the destruction of the coastwise carriers.

Carefully considering the factual situation before it, the Commission found destructive competition. To attract traffic, the coastwise carriers must establish rates somewhat below rail rates. (R. 34) The proposed rail TOFC rates are established on a parity with sea-land rates. (R. 35) The water carriers convinced the Commission that they would be compelled to reestablish their rates on a depressed basis below rail TOFC rates, that "the rate-cutting activity probably would not stop even at that destructive level, and that quite certainly a further vicious cycle of rate cutting would ensue." (R. 29)

On the other hand, the water carriers must recover their fully distributed costs on the overall sea-land

operation to continue in business. (R. 35) There were, therefore, ample findings to support the Commission's conclusion that:

> "The reduced rates of the railroads here under consideration are an initial step in an overall program of rate reductions that can fairly be said to threaten the continued operation, and thus the continued existence, of the coastwise water-carrier industry generally." (R. 38)

Obviously, the Commission was faced with the opening campaign in a rate war. Far from enhancing competition, such a rate war could only have the effect of eliminating it.

In judging the destructive nature of the ensuing war, the court below disregarded an extremely significant fact. In its opinion, the court included as one of the Commission's essential findings:

> "4. All Sea-Land traffic is competitive with the railroads. But only a fraction of railroad traffic is competitive with Sea-Land. R. 45." (R. 246)

The clear advantage thus given the railroads in a destructive rate war was made clear in the Commission's decision:

> "All of Pan-Atlantic's traffic is competitive. On the other hand, Pan-Atlantic argues that the traffic which the railroads seek to retain or obtain in competition with Pan-Atlantic and Seatrain constitutes only a small part of their total traffic in the areas here affected, and that because of the volume of their noncompetitive traffic the railroads could, if permitted to do so, reduce their sea-land competitive rates to an out-of-pocket cost basis and make up most or all of the difference

between that level and their fully-distributed costs on other traffic." (R. 35) [14]

The rate reductions before the Commission were, there-therefore, selective rate cuts and part of a program of rate reductions which would put the coastwise carriers out of business.

The court below held that a conclusion as to destructive competition could not be bottomed upon these

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[14] This precise factual situation was raised by Sen. Kefauver during debate on the new rule of ratemaking: "My question with relation to section 5 is this: A barge line competes with a railroad in all of its services; but a railroad may compete with a barge line only with respect to a very small part of the railroad service.

"As I understand section 5, the Interstate Commerce Commission may allow a railroad to make a rate to compete with a barge line with respect to that part of the system where it does compete with barge lines, on the basis of its out-of-pocket expense, without considering its overhead. The overhead may be made up in that part of its operations with respect to which it does not compete with the barge line.

"Is that situation still possible under section 5, or does the language giving due consideration to the objectives of the national transportation policy declared in this act require the railroad to take into consideration a part of its overhead in making its rate to compete with the barge line?" 104 Cong. Rec. 10858-10859.

Sen. Smathers replied that it was intended to permit the Commission to approve rates of a given mode of transportation, irrespective of the direct relationship it may have to the rates of another mode, "so long as such rates do not result in unfair competitive practices." 104 Cong. Rec. 10859.

Sen. Kefauver persisted: "I should like to ask a question of the Senator from Florida. Some people have expressed the belief that under the provisions of section 5 it would be possible for one type of carrier to lower its rate to such an extent that another carrier would not be able to compete fairly on the basis of charging the overhead to that other carrier. There is nothing in the provision contained in section 5, is there, which would enable one carrier to take undue advantage of another carrier, beyond the general policy set forth in the National Transportation Act?"

Sen. Smathers. "No. The answer is no." 104 Cong. Rec. 10859.

findings. This conclusion was, however, consistent with prior Commission decisions and in accord with destructive competition as defined under similar statutes. The Commission has held that successive retaliatory rate reductions by competing carriers constitute a destructive rate war and accomplish no more than a needless dissipation of the competitors' revenues. In many decisions, the Commission has found that such run-away rate cutting constitutes destructive competition. *Tobacco From North Carolina To Central Territory,* 309 ICC 347 (1960) at page 361; *Bituminous Coal Via Motor-Rail From Lynnville, Ind. To Chicago, Ill.,* 313 ICC 573 (1961) at page 576; *Alcoholic Liquors From N.H. and N.Y. to Tex. and La.,* 315 ICC 124 (1961); *Sugar, South to Indiana, Ohio River, Intermediate Points,* 315 ICC 521 (1962) at pages 527-528; *Agricultural Insecticides—Heyden, N.J., to Houston, Tex.,* 315 ICC 623 (1962) at pages 625-626.

The soundness of the Commission's decision is also confirmed by the interpretation given "destructive competition" under other statutes. In *New York Central Railroad Company* v. *United States,* 194 F. Supp. 947 (S.D. N.Y. 1961), aff'd *per curiam* 368 U.S. 349 (1962), the court relied upon court decisions interpreting unfair competition or practices under the Federal Trade Commission Act of 1914 and the Shipping Act of 1916. The court found that these decisions furnished support for the Commission's finding as to an "unfair or destructive competitive practice" under the Interstate Commerce Act.

As in the *New York Central* case, the Commission's conclusion regarding "destructive competition" finds ample support in court decisions under the Clayton

and Robinson-Patman Acts. For example, in *Moore v. Mead's Fine Bread Co.*, 348 U.S. 115 (1954), reh. den. 348 U.S. 932 (1955), the defendant destroyed a local competitor by discriminatory price cutting. There, as in the instant case, this destruction was accomplished by a price war. The destructive potential of discriminatory price-cutting was clearly described by this Court:

> "We have here an interstate industry increasing its domain through outlawed competitive practices. The victim, to be sure, is only a local merchant; and no interstate transactions are used to destroy him. But the beneficiary is an interstate business; the treasury used to finance the warfare is drawn from interstate, as well as local, sources which include not only respondent but also a group of interlocked companies engaged in the same line of business; and the prices on the interstate sales, both by respondent and by the other Mead companies, are kept high while the local prices are lowered. If this method of competition were approved, the pattern for growth of monopoly would be simple. As long as the price warfare was strictly intrastate, interstate business could grow and expand with impunity at the expense of local merchants. The competitive advantage would then be with the interstate combines, not by reason of their skills or efficiency but because of their strength and ability to wage price wars. The profits made in interstate activities would underwrite the losses of local price-cutting campaigns." 348 U.S. 119.

In the instant proceeding the competitive advantage of the railroads stems not from their "skills or efficiency," there being no finding of inherent advantages on their part, but instead from "their strength and ability to wage price wars."

As the court observed in *Balian Ice Cream Co. v. Arden Farms Co.,* 104 F. Supp. 796 (S.D. Cal. 1952), aff'd 231 F. 2d 356 (1955), cert. den. 350 U.S. 991 (1956), price discrimination may violate the Sherman, Clayton or Robinson-Patman Acts, and ". . . price discrimination, predatory in nature, is an accepted method of destroying competitors." 104 F. Supp. 800.

The Commission was, therefore, completely justified in finding destructive competition in the incipient rate war before it. The existence of the coastwise carriers was threatened, and there was no inherent advantage on the part of the railroads to provide economic justification for the destruction of the coastwise industry. In establishing rate parity, the railroads' rates went below the level necessary to meet the competition of the water carriers. The court below clearly erred in finding that the Commission could not find destructive competition on this state of facts.

Despite the fact that a full-fledged rate war was the inevitable consequence of the rail rate reductions, the court below insists that the Commission is powerless until the rates of the competing carriers have reached a non-compenstory level. Referring to this rate war, the court stated:

> "But surely, under its power to fix minimum rates, 49 U.S.C. sec. 15(1), the Commission will have power to disapprove rates not compensatory." (R. 257)

In the first of its "essential findings," the court clearly recognizes a compensatory rate to be one which covers out-of-pocket costs. (R. 245, see also footnote 7, R. 245) Thus, the court denies Commission power to halt rate wars until the out-of-pocket cost level has been reached.

In the court's view, the Commission has no *preventive* power against the debilitating effects of a rate war. It must stand idle until cutthroat competition has rendered the carriers incapable of meeting their overhead obligations. Considering the sixth "essential finding" that Sea-Land must recover fully-distributed costs to remain in business (R. 246), the court has vitually guaranteed the destruction of that carrier. The court has placed a premium on ability to engage in out-of-pocket ratemaking that is completely inconsistent with its view concerning "inherent advantages." It has opened the door to destructive rate wars in which victory depends upon abilities not reflecting superior efficiency or lower *total* costs of operation.

It is quite clear from the district court's opinion that the level of a carrier's out-of-pocket costs is not an "inherent advantage" which the Commission is obliged to recognize. As the court clearly states: "Thus the 'inherent advantages' of lower cost (or better service, which is discounted for price) refers to the long-run, or fully-distributed, costs of carriage." (R 248, see also footnote 10a to the court's opinion, R. 248) Despite this conclusion, the district court lays down a definition of "destructive competition" which permits destruction of competitors through a non-economic advantage, i.e., superior ability to engage in rate making below fully-distributed costs. This ability depends not upon superior economic efficiency but instead upon the volume of noncompetitive traffic to which overhead or constant costs can be shifted. In such a struggle, the coastwise carriers are at a decisive disadvantage for, as the Commission found:

> "4. All Sea-Land traffic is competitive with the railroads. But only a fraction of railroad traffic is competitive with Sea-Land." (R. 246)

But the district court in effect dooms the coastwise carriers to destruction by restricting the Commission's power to halt a "full-fledged rate war" only when rates have been reduced to noncompensatory levels. (R. 257) The district court completely fails to recognize that carriers may be destroyed by a competitor's rates which cover out-of-pocket but not fully-distributed costs. This conclusion is, of course, completely inconsistent with the Commission's finding that Sea-Land must recover fully-distributed costs to remain in business.

Obviously the Commission must have power to prohibit the unnecessary and exhausting dissipation of revenues which results from rate wars if competition by smaller carriers is to be preserved at all. Successive and retaliatory rate-cutting needlessly dissipates the revenues of the competing carriers even before out-of-pocket levels are reached. Such a contest of ability to reduce rates to the out-of-pocket level involves the employment of predatory advantages no less than a rate war testing the competitors' ability to absorb out-of-pocket losses. Unless the Commission has power to protect the transportation industry from the deleterious effects of both kinds of rate wars, certainly the Commission's minimum rate power has become meaningless.

## IV. FULLY-DISTRIBUTED COST, AS DETERMINED BY THE INTERSTATE COMMERCE COMMISSION, IS THE PROPER CRITERION FOR IDENTIFYING INHERENT ADVANTAGE IN COST OF SERVICE

It has been shown that the Commission's decision was sound in fact and in law, and that the district court erred in reversing the Commission, primarily out of a failure to comprehend the nature of "destruc-

tive competition". But the district court has proceeded to lay down criteria ostensibly to govern the case should the proceeding be reopened before the Commission. In large measure these criteria assume a determination by the Commission as to the inherent advantages of the competing modes, a determination it was unable to make on the record before it. The significance of these criteria as a precedent makes it imperative that these standards be dealt with in succeeding parts of this brief. For purposes of subsequent argument, it may be necessary on occasion to assume a determination as to inherent advantages. Such assumption is without prejudice to the foregoing contention that the Commission was correct in deciding the case before it without regard to, and in the absence of, a determination of inherent advantages.

In applying the "inherent advantages" criterion, the district court has again fallen into error. The court failed to perceive that the preservation of inherent advantages of cost has two facets: first, allowing a low-cost carrier to assert its inherent advantage by attracting traffic through lower rates, *and second, protecting a low-cost carrier's traffic from rate-cutting by the high-cost carrier.* The intensification of competition contemplated by the Transportation Act of 1958 consists not only of increased freedom in ratemaking—it also consists of curbing such freedom where competition by the low-cost carrier is jeopardized. If competition is to be promoted, it must be restrained where it reaches the point of eliminating the more efficient competitors.

The guide lines laid down by the district court do not assure the preservation of low-cost competition. The general principles enunciated by the court are correct. But the manner in which those principles are applied

by the district court establishes a dangerous precedent which, if consistently followed, may actually thwart the purposes of the new rule of ratemaking.

The court below correctly stated that "lower cost of equipment, operation, and therefore service" is precisely the kind of inherent advantage the Commission must preserve. (R. 248, note 10a) *Interstate Commerce Commission* v. *Mechling,* 330 U.S. 567, 575 (1947); *Dixie Carriers* v. *United States,* 351 U.S. 56, 59 (1956); *Schaeffer Trans. Co.* v. *United States,* 355 U.S. 83, 91 (1957) ("[t]he ability of one mode of transportation is precisely the sort of 'inherent advantage' that the congressional policy requires the Commission to recognize"). The court correctly interpreted such advantages as *long-run* advantages:

> "The first policy-factor mentioned in the NTP declaration is to 'recognize and preserve the inherent advantages of each [mode of transportation].' By 'the inherent advantages' was meant the ability of a mode of transportation over the long run to provide a transportation service more acceptable to its shippers, by reason of quality or price, than that offered by a competing mode. That the calculation was to be long-run must be emphasized. The shorter-run 'out-of-pocket' costs of one mode (e.g., railroads) may be lower than the longer-run 'fully-distributed,' or even the shorter-run costs of competing modes (e.g., water carriers) whose long-run costs are lower. When they are, rates set reference to out-of-pocket costs may favor what in the long run is the less efficient, higher-cost mode. Thus the 'inherent advantages' of lower cost (or better service, which is discounted for price) refers to the long-run, or fully-distributed, costs of carriage." (R. 247-248)

The court below was absolutely correct in identifying "longer-run fully-distributed" costs as the measure of inherent advantage in cost of service. The economic reasoning behind this principle is eminently sound. This was explained by Chairman Freas of the Interstate Commerce Commission in testifying before the Surface Transportation Subcommittee of the Senate Committee on Interstate and Foreign Commerce on March 28, 1958:

> "It is the Commission's endeavor so to perform its ratemaking functions as to protect the public interest in conformity with the policy laid down by the Congress. In so doing we try to accord to each mode of transportation every advantage to which the characteristics of its operation entitle it. We undertake to construct rates so as to encourage the flow of traffic via the most economical form of transportation.
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> "The most economical form of transportation is that form which, if rates reflected costs, would tend to be favored by shippers. For the purpose of ascertaining the most economical form of carriage, full costs should be the test. It is full costs that must be returned to the carriers if the transportation industry is to be kept healthy and vigorous." (Hearings, *supra*, footnote 13, page 1839)

This reasoning was reiterated by Chairman Winchell of the Commission in testifying before the Subcommittee on Merchant Marine and Fisheries of the Senate Committee on Interstate and Foreign Commerce on June 17, 1960:

> "The main purpose of the Commission, in the area of competitive rate making, is the protection of the public interest in accordance with the policy established by the Congress. It therefore follows logically that each mode of transportation must,

under that policy, be given every opportunity to utilize to the fullest whatever advantages may be characteristic of its particular operation. In this manner, rate construction is founded upon a basis which encourages the flow of traffic by way of the most economical form.

"It is of particular importance, if the Commission is to encourage the movement of traffic by the most economical mode, that we have full factual information available relating to costs. The most economical mode should be determined by using full costs as a basis."

Fully-distributed costs reflect a carrier's economic fitness over the *long run*. They measure the carrier's ability to handle traffic at the lowest *over-all* cost on a permanent basis. As the court below stated, " 'Fully-distributed costs' of operation are actually the ICC's estimate of returns necessary to continued profitable operation." (R. 253) As the legislative history of the new rule of ratemaking suggests, this is precisely the kind of advantage that Congress wished to see asserted in increased competition.

Having recognized the significance of fully-distributed costs, the court then reveals a misconception as to how such costs are derived. The court correctly recognizes that value-of-service reflects ability to pay for transportation service. (R. 252) But the calculation of fully-distributed costs, and hence the identification of the low-cost carrier, is not based upon value of service or ability to pay.

"Fully distributed costs based on the out-of-pocket costs plus a revenue-ton and revenue ton-mile distribution of the constant costs, including deficits, indicate the revenue necessary to a fair return on the traffic, *disregarding ability to pay.*" *New*

*Automobiles in Interstate Commerce,* 259 I.C.C. 475, 513 (1945) (emphasis supplied).

It is not true that the fully-distributed costs ascertained by the Commission reflected "an estimate of what contribution to total revenue the high-value commodities here involved should make." (R. 254) The fully-distributed costs of both the railroads and Sea-Land were computed to reflect the "revenue necessary to a fair return on the traffic." Obviously the court's misconception of how fully-distributed costs are computed led it into the error of rejecting comparative TOFC and Sea-Land costs as "incommensurate quantities." (R. 254)[15] Aside from the fact that certain variables, such as transporting one or two trailers on a flatcar, and the shift of Sea-Land traffic from one port to another, prevented precise and final determination of full costs (R. 36), the procedures followed by the Commission were proper. Fully-distributed costs, as calculated by the Commission, furnished a valid basis for determining the low-cost carrier.

But the court below went even further. It held that Sea-Land could not be protected from destructive competition unless it was shown to be the *overall low-cost*

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[15] The Court below has fallen into serious error by attempting to substitute its own judgment for that of the Commission as to subject matter involving expert judgment. As this Court observed in *New York* v. *United States,* 331 U.S. 284, 328 (1947): "We start, of course, from the premise that on a subject of transportation economics . . . the Commission's judgment is entitled to great weight. The appraisal of cost figures is itself a task for experts, since these costs involve many estimates and assumptions and, unlike a problem in calculus, cannot be proved right or wrong. They are, indeed, only guides to judgment. Their weight and significance require expert appraisal." The court below obviously did not approach the Commission's judgment in such a manner.

*mode.* (R. 255-256) In other words, Sea-Land could derive no protection from rate reductions on the higher-cost (and higher quality)[16] TOFC service unless it provided a lower-cost service than both TOFC *and* boxcar service. Thus, the inherent advantage of lower-cost Sea-Land service could not be preserved from rate cutting on TOFC traffic unless Sea-Land also provided lower-cost service than boxcar service. Under this reasoning, any inherent advantage Sea-Land might possess vis-a-vis TOFC service is completely dissipated.

The complete inconsistency of this reasoning is shown by the court's admonition that "a railroad rate for a particular movement, if it yields the railroad's fully-distributed cost which is lower than the water carrier's fully-distributed cost, may not be disturbed." (R. 259) The effect of the court's ruling is that the Commission *may not* preserve Sea-Land's inherent cost advantages compared with rail TOFC service, but *must* preserve the railroad's inherent cost advantage on *specific* traffic.

If the Commission is to preserve inherent advantages of lower cost, it must do so on a more consistent basis than that proposed by the district court. If a carrier is the low-cost mode on a particular movement, obviously its inherent advantage must be preserved from rate cutting *on that particular movement.* If a carrier is *in general* a lower-cost mode, obviously it must be preserved from over-all destruction by a higher-cost mode. If the preservation of inherent advantages means anything, it must mean the preservation of the low cost mode, both on an over-all basis and as to its rates on particular traffic.

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[16] See "essential finding" No. 3. (R. 246)

The foregoing principles are basic to a consistent interpretation of the new rule of ratemaking. The rule is intended to promote greater freedom in the assertion of inherent advantages. If the Commission is to be "consistent," however, this rule of ratemaking implies *restraint* as well as *freedom*. The Commission may not allow competitive situations to develop which jeopardize the assertion of inherent advantages. As the district court itself recognized, "It was thought undesirable that one mode should undercut the rates of a competing lower-cost mode." (R. 248) The prohibition against holding up the rates of one mode to protect the traffic of another mode clearly cannot be invoked by a mode without a proven inherent advantage in cost or service. Equally as clearly, it should not be necessary for the existence of the lower-cost mode to be in jeopardy before its inherent advantage is to be preserved.

These principles mean that Sea-Land should be protected from rate cutting on rail TOFC service, if Sea-Land service enjoys an inherent advantage of lower costs, regardless of whether Sea-Land's existence is threatened thereby. In other words, there is no justification for requiring Sea-Land to prove that its "integral overall rate structure" is in jeopardy and must be protected under the National Transportation Policy in order for the Commission to protect its inherent advantages of cost *vis-a-vis* rail TOFC service. The reasoning adopted by the district court would permit a carrier, by cutting rates on higher value and higher cost service, to deprive another carrier of traffic to which it is entitled on the basis of superior economic efficiency as compared to that service.

On the other hand, the district court has treated properly the second way in which preservation of the

low cost carrier may be required. Where a carrier is *in general* the low-cost mode, the district court recognizes that value of service considerations may demand rates for that carrier above its fully-distributed costs. (R. 259) In other words, Section 15a(3) does not compel the Commission to allow rate levels to be depressed to the low cost carrier's fully-distributed costs on *all* segments of traffic. Value of service considerations may require substantial tonnage to be carried at rates below fully-distributed costs, as has been indicated above. If, therefore, the Commission were precluded from protecting *any* of the low cost carrier's rate levels above its fully-distributed costs, the continued operation of the low cost carrier would be jeopardized. Such a result would thwart, rather than further, the low cost carrier's inherent advantage.

It is thus essential that in any case where a carrier possesses an inherent advantage the Commission be permitted, as the district court has indicated, to protect that carrier's rates on specific traffic at levels above its fully-distributed costs. As the district court suggests, the preservation of such an inherent advantage of the low cost carrier would also justify holding the rates of the higher cost carrier above its fully-distributed costs. (R. 259, cf. R. 255-256) Thus, insofar as a carrier possesses an inherent advantage of lower cost, its rate levels should be permitted to reflect value of service considerations to the end of preserving its inherent advantages. Rate levels for the low cost carrier which reflect value of service are necessary to both the continued existence of that carrier and the furtherance of the purposes of Section 15a(3).

## CONCLUSION

In the instant case, the Commission properly invoked its clear statutory power to prevent destructive competition. The validity of its decision is unaffected by the new rule of ratemaking in Section 15a(3) of the Interstate Commerce Act, since the rail rate reductions at issue were not shown to involve the assertion of inherent advantages of cost or service. The District Court was correct in identifying fully-distributed costs as the proper measure of inherent advantages of cost and in affirming the Commission's power to fix minimum rates above fully-distributed costs to protect a carrier's inherent advantage of cost, but erred in rejecting the Commission's method of calculating fully-distributed cost.

Accordingly, the judgment of the District Court should be reversed.

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